Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN, ET AL.,
Petitioners

v.

HAROLD E. BRADFORD,
Respondent.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States the Commonwealth of Virginia as Amicus Curiae submits this Brief in support of Petitioners. The interest of the Commonwealth of Virginia in this matter rests upon its acute concern with the continued existence and growth of the parole system as an integral part and increasingly more important part of the correctional system. Heavy emphasis is now being placed upon alternatives to incarceration as a result of a shift in emphasis from punishment to rehabilitation. The Commonwealth, while believing that parole procedures must be essentially fair, is

concerned with the assertion that the due process of law clause of the Fourteenth Amendment of the Constitution of the United States is applicable to such procedures, believing that the clause does not apply to such procedures and that application of the clause to such procedures can only result in a tendency toward destruction of the parole system, its nature, and goals. Application of the clause and of any of its specific requirements would tend to adversely affect parole systems in each of the States, as well as the Federal parole system. This Brief is intended to be reflective of the concern of the Commonwealth in that respect.

ISSUE PRESENTED

I.

Is The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution Applicable To Parole Procedures?

RELEVANT CONSTITUTIONAL PROVISIONS

Fourteenth Amendment To The Constitution Of The United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

I.

The Due Process Requirements Of The Fourteenth Amendment Of The United States Constitution Are Not Applicable To Parole Procedures.

Prior to the decision in this case by the United States Court of Appeals for the Fourth Circuit, it had been held in several Circuits that the due process clause of the Fourteenth Amendment was not applicable to parole procedures. *Menechino* v. *Oswald*, 430 F.2d 403 (2nd Cir. 1970), cert. den., 400 U.S. 1023 (1971); *Walker* v. *Oswald*, 449 F.2d 481 (2nd Cir. 1971); *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973), vacated on other grounds, 414 U.S. 809 (1973); *Buchanan* v. *Clark*, 446 F.2d 1379 (5th Cir. 1971); *Baines* v. *U.S.*, 445 F.2d 260 (8th Cir. 1971); *Schawartzburg* v. *Board of Parole*, 399 F.2d 297 (10th Cir. 1968). *Hyser* v. *Reed*, 318 F.2d 225 (D.C. Cir. 1963), cert. den. sub. nom. *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963).

Morrissey v. *Brewer*, 408 U.S. 471 (1972), *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), in which it was held that the due process clause was applicable to procedures involving revocation of parole, revocation of probation, and prison disciplinary proceedings, respectively, do not lend support to the view that the due process clause is applicable to parole procedures.

These decisions all related to a State's power to adversely change the existing status of an individual and were concerned with the forfeiture of a present status and the deprivation of an existing liberty.

An inmate has no constitutional right to parole. Parole arises only pursuant to enabling legislation. The due process

clause of the Fourteenth Amendment does not require a hearing in every conceivable case of governmental impairment of a private interest. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961).

The issue in this case, not over-simplified in the view of Amicus Curiae, is whether there is a Constitutional requirement that parole procedures now be transformed into adversary proceedings. For if there is application of due process of law requirements to parole procedures, that will be the result.

The nature of parole proceedings as they presently exist, is well summed up by Judge (now Chief Justice) Burger in *Hyser, supra*, in 318 F.2d at p. 237:

> "The Bureau of Prisons and the Parole Board operate on the basic premise that prisoners placed in their custody are to be rehabilitated and returned to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus, there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. . . .
>
> * * *
>
> "Fundamentally the Parole Board's interest and its objectives are to release a prisoner as soon as he is a good parole risk and to allow him to remain at liberty under . . . supervision as long as he is a good risk . . ."

Parole procedures are not presently adversary in nature. There are no plaintiffs; there are no defendants. The procedures are not a matter of contest. There is no presumption against an inmate, and an inmate faces no opponent in the procedures. There are no "accusations"; there are no "accused."

Assuming that the due process clause of the Fourteenth Amendment were applicable to parole procedures and that ordinary due process requirements were thus applicable, such as appointment of counsel to represent indigent inmates, compulsory attendance of witnesses on behalf of inmates, compulsory attendance of witnesses adverse to an inmate, disclosure to an inmate prior to hearing of material to be relied on by a parole board, it is submitted that such procedures would tend to bankrupt and disrupt the parole system and its goals. On the other hand, if none of these requirements were applicable even though it was held that the due process clause was applicable, a decision holding the clause to be applicable would be somewhat meaningless. Thus, it is considered appropriate by the Amicus Curiae to consider normal requirements of the Clause in an attempt to determine whether the clause itself is applicable, even though this might appear to constitute a "back-door" approach.

As the Court in *Wolff, supra*, *Morrissey, supra*, *Gagnon, supra*, and *Hannah* v. *Larche*, 363 U.S. 420 (1960), did not refuse to recognize institutional safety or correctional goals in applying due process standards, it is submitted that there can be no refusal to recognize the practical administrative realities of the relief which Appellees seek as well as the nature and goals of parole as reflected in present procedures, before holding the due process clause to be applicable at all.

Requirements of locating competent counsel appointing them to represent inmates, the determination of and subpoenaing of witnesses adverse to the inmate, subpoenaing of

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witnesses on behalf of inmates, providing a mechanism by which inmates could review files in advance of the hearing, providing for the security of such files, actual hearing of in witnesses, cross-examination of witnesses, and arguments of counsel would totally change the present system and make near impossible the reaching of its present goals.

If the due process clause were made applicable to such procedures, and for example, counsel were required to be appointed for inmates, the result might necessarily be that the State would be forced to take a "side" against the inmate and use its legal talent, all evidence that could muster, any reasonable argument it could make, in order to defeat the granting of parole if, for no other reason, than to make each side "equal" in the proceedings. Such a result would be catastrophic to the system and would be opposed to the very nature and theory of parole.

In *Gagnon, supra*, the Court in addressing itself to the right of counsel at probation revocation hearings stated as follows:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all availabe evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge of a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to

> reincarcerate rather than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record and the possibility of judicial review—will not be insubstantial." (footnote omitted.) 411 U.S. at pp. 787-788.

Applicability of the due process clause may not be considered in a vacuum. It must be considered as it relates to the nature and goals of parole and to the practical application of those goals.

In *Morrissey* v. *Brewer, supra*, the Court stated in 408 U.S. at p. 480 as follows:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a Defendant in such a proceeding does not apply to parole revocations."

In *Wolff, supra*, the Court repeated the statement as applicable to prison disciplinary proceedings.

In *Wolff, supra*, the Court stated in 418 U.S. at p. 561:

> "In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by Morrissey for alleged parole violators in the very different stake the State has in the structure and content of the prison disciplinary hearing."

The Court then reviewed realities surrounding the components of a penal system.

In *Wolff, supra*, the Court in 418 U.S. at p. 572, after holding specifically how due process applied to prison disciplinary proceedings, stated as follows:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmate and the needs of the institution."

In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court held that the due process clause of the Fourteenth Amendment required hearings prior to suspension of students from school.

The Court stated in 419 U.S. at p. 579 as follows.

> "It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. *Cafeteria Workers* v. *McElroy*, *supra*, at 895; *Morrissey* v. *Brewer*, *supra*, at 481."

The Court also stated at 419 U.S. at p. 583 as follows:

> ". . . . Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cause more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroys its effectiveness as part of the teaching process."

In *Wiley* v. *United States Board of Parole, et al.*, 380 F.Supp. 1194 (M.D. Pa. 1974), the Court stated as follows:

> ". . . . It is apparent that due process does not require that the full panoply of rights due a parolee in a parole revocation proceeding be imposed on parole decisionmaking. Unlike a parolee facing reimprisonment who stands to lose a presently enjoyed interest in his conditional freedom, the prisoner being considered for parole release has a mere anticipation or hope of freedom. More important is the fact that the nature of parole decision-making is vastly different from that of parole revocation. Unlike a parole release decision, a necessary precondition to a parolee's reincarceration is a finding that he has violated a condition of his parole. The parolee's loss of his conditional freedom turns in large part on a retrospective determination of a specific factual question. In contrast, the parole release decision, as emphasized above, is a prognostic determination with respect to one's suitability for parole and is based on a complex of tangible and intangible factors and involves the discretionary application of knowledge derived from such fields as psychology, criminology, sociology and penology. While the parole revocation procedure basically is concerned with making a factual determination with respect to parole violation, parole decisionmaking centers on making a diagnostic and predictive determination with respect to whether the rehabilitation of the prisoner and the welfare of society generally would be best served by granting the inmate's conditional freedom rather than by his physical confinement." (380 F.Supp. at p. 1200).

It has been rather consistently held that various due process requirements are not applicable to parole procedures. *Menechino, supra; Ott* v. *Ciccone*, 326 F.Supp. 609 (W.D. Mo. 1970); *Buchanan, supra, Schawartzburg, supra; Ganz* v. *Bensinger*, 480 F.2d 88 (7th Cir. 1973), right to counsel.

Prior disclosure to an inmate of information used by a parole board has also been held not to be required by the due process clause. *Menechino, supra; Barradale* v. *United States Board of Paroles and Pardons*, 362 F.Supp. 338 (M.D. Pa. 1973); *Ott, supra; Wiley, supra; Goble* v. *Bounds*, 281 N.C. 307, 188 S.E.2d 347 (1972).

The right to have witnesses present as well as the right to cross-examine "adverse" witnesses has also been rejected. *Barradale, supra; Tarlton* v. *Clark*, 441 F.2d 384 (5th Cir. 1971); *Menechino, supra; Wiley supra.*

It has also been held that there is no constitutional requirement that a parole board give reasons for denying parole. *Battle* v. *Norton*, 365 F.Supp. 925 (D. Conn. 1973); *Menechino, supra; Barradale, supra.*

It is submitted that any application of due process of law requirements similar to those required by this Court in *Morrissey, Gagnon,* or *Wolff* to parole procedures would have no other effect other than making those procedures adversary in nature. The nature of the parole system is such that a requirement that it be adversary would destroy its nature and goals.

Amicus Curiae has quoted extensively in this Brief language of this Court respecting the application of the due process clause to procedures other than parole procedures. The purpose is to demonstrate that this Court has taken into account, by necessity, the nature of those procedures as well as the effect of applying to these procedures due process requirements. It is submitted that this Court's careful and limited holdings that due process of law requirements are applicable to various procedures fortifies the contention of Amicus Curiae that such requirements are not applicable to parole procedures and that thus the due process clause itself is not applicable.

The District Court in the case at bar stated very well the difficulty in applying due process of law to parole hearings. It stated:

> ". . . The administrative burden of the parole system would be enormously increased if each inmate were given a plenary hearing on his suitability for parole.

> Further burdens would ensue with requirements of notice, procedures for the appointment of counsel and reporters, subpoenaing and cross-examination of witnesses, compensation of counsel and cost of transcripts, and the preparation of findings and conclusions by the Board. Such requirements would likely result in congested dockets before the Board of Paroles and result in undue delay in reviewing the individual cases of 10,000 prisoners in the system as each becomes eligible for parole consideration. The state is not constitutionally required to provide for the parole of prisoners, and if the Plaintiff's demands were enforced and the burden of the prison system became too great, the state might find it necessary or desirable to terminate the parole system."

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners to Howard Lesnick, Esquire, Counsel for Respondent, University of Pennsylvania School of Law, 3400 Chestnut Street, Philadelphia, Pennsylvania 19174, and to Jacob L. Safron, Assistant Attorney General, Counsel for Petitioners, Justice Building, Post Office Box 629, Raleigh, North Carolina, on July 16, 1975.

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